Supreme Court, U.S.
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NO. 02-20

IN THE

SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, *et al*,

Petitioners,

v.

JERRY DEAN McCOY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals decide correctly, when it affirmed the decision of the United States District Court, that the conviction of Jerry McCoy in an Arizona trial court was based on evidence insufficient to sustain that conviction?

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Respondent Jerry Dean McCoy, through counsel, respectfully requests this Court deny the petition for writ of certiorari and decline to issue a writ to review the judgment and opinion of the Ninth Circuit Court of Appeals in *McCoy v. Stewart*, 282 F.3d 626 (9th Cir.2002).

STATEMENT OF THE CASE

Indicted by a Pima County, Arizona grand jury on March 10, 1994, for the crime of assisting a criminal syndicate, alleged to have occurred between June and September of 1993, Mr. McCoy went to trial in the superior court of Pima County, Arizona on August 16, 1994. The jury returned a guilty verdict on the single count on August 23, 1994. The verdict, combined with enhancement allegations by the state, and aggravating factors found by the sentencing judge, resulted in a sentence of fifteen years imprisonment for Jerry McCoy. Sentence was imposed on September 26, 1994.

Mr. McCoy appealed the verdict and sentence. The Arizona Court of Appeals, in a published opinion, affirmed the judgment and sentence of the trial court on February 13, 1996. Jerry McCoy petitioned the Arizona Supreme Court for review of the case, through counsel, on June 27, 1996 and, *in propria persona*, on May 17, 1996. The Arizona Supreme Court denied review, without comment, on November 21, 1996.

Jerry McCoy then petitioned the trial court for post-conviction relief on November 14, 1996. The trial court denied the petition the day of filing. Mr. McCoy, who received no notice of the denial, continued to pursue this remedy. Ultimately, the matter went to the Arizona Supreme Court, which denied review of the matter.

Jerry Dean McCoy timely filed a federal petition for writ of habeas corpus on September 4, 1998. The district court granted his petition on April 5, 2001. The State of Arizona appealed the district court's decision to the Ninth Circuit Court of Appeals, who

affirmed the district court's decision in the opinion now challenged by Arizona.

Statement of Facts

An Arizona grand jury indicted Jerry Dean McCoy on March 10, 1994. The indictment contained one count--participating in a criminal street gang in violation of Arizona Revised Statute (hereinafter, "A.R.S.") § 13-2308(A)(3).[1] other statutes cited in the indictment classified the grade of the offense and authorized imprisonment and fines.

Jerry Dean McCoy maintained he was innocent of the charge and went to trial, in Pima County (Arizona) Superior Court on August 16, 1994. From the beginning of the trial, it was obvious the state's evidence against McCoy consisted mostly of his association with persons who identified themselves as members of the "Bratz," or "Traviesos."

During jury selection and again in opening argument, the prosecutor admitted the state's case was more conceptual than factual. In explaining why he struck a juror, the prosecuting attorney commented:

> Well, we feel that -- I know that this is difficult to put into words, but I just got the sense from Ms. Delavara that she was a -- or is, and I could be wrong about this, but I got the feeling that she is a person who is rather coarse and has lived a tough life in some ways and just may not be that sensitive to the kinds of issues that we are trying to raise and persuade the jury about in this case. *We are not talking about an egregious murder or robbery or a rape or that kind of a crime in this case, and I got the sense that Ms. Delavara would not be that receptive to a crime which is as much a matter of concept as is a matter of -- a matter of fact.* And for those reasons we just did not feel that Anita Delevara was a good juror for this kind of a case with these kinds of issues presented by the charge we are bringing here. (emphasis added).

[1] Interestingly, at the time of the offense alleged in the indictment, there was no such crime as "participating in a criminal street gang." A.R.S. § 28-2308(A)(3) outlawed furnishing advice to a criminal syndicate. The term "criminal street gang," as defined by A.R.S. § 13-2301(A)(2), the only definition in effect in 1993, applied only to allegations of loan-sharking.

In his opening statement, the prosecutor continued explaining the case in this vein, telling the jury the evidence would not show that McCoy gave any advice or encouragement to the group on committing crimes, but simply, through his communication with the group, a supposed gang, contributed to their cohesion.

> The Defendant's crime was, as the evidence will show, that he strengthened this Bratz gang by giving them advice and encouragement and sharing his knowledge and experience that he had gained from being a member of the Toonerville gang years ago. The evidence will show further that McCoy helped to expand the numbers of the Bratz gang and helped tighten the bonds between members of the gang, knowing full well from his experience in Los Angeles that the Bratz gang would expand and expand its influence by violence and intimidation. The evidence will show that certainly that as Mr. McCoy's intent.
>
> You will not hear evidence in this case, I should tell you up front, that Jerry McCoy helped to plan or to advise the Bratz or Traviesos gang, or instruct them in the commission of a particular crime, such as assault, or a particular murder, or a particular theft, or a particular drug deal. You will not hear testimony and you will not see evidence that McCoy participated in the commission of a particular assault or a particular robbery or a particular theft or a particular drug deal. That is not what this case is about.

The state's first witness, Tucson Police Department Detective Christopher Cuestas, identified himself as an expert in youth street gangs. In summary, his opinion was that the Bratz was a gang and that McCoy could have filled a role as a mentor to the gang's young members. Cuestas opined on who were members of the gang and identified graffiti he believed was made or on behalf of gang members. He laid a foundation for photographs

showing McCoy with young people Cuestas believed were gang members.

Detective Cuestas testified he interviewed Jerry McCoy on March 2, 1994. In the interview, McCoy denies advising or directing any of the individuals identified by Cuestas as gang members. He admits talking to them about his experiences years before as a gang member in California.

None of the witnesses called at McCoy's trial provided any testimony that McCoy advised or directed them in furtherance of any criminal objectives. John Garibaldi testified that he had been jumped-into the Bratz, was a member of the Bratz during the summer of 1993, and had seen Jerry McCoy when he was with other people. Garibaldi testified that at sometime--he did not remember when--McCoy related to someone how the gang McCoy once belonged to was run. The gist of McCoy's reminiscence was that his gang had elected officers. Garibaldi recalled that for about a week or two, some people kicked around the idea of having officers and then recalled he had earlier said a secretary and a president had been selected.

At the end of his testimony, Garibaldi admitted that McCoy had never said anything directly to him about gangs. He only heard from others what they had said McCoy had said.

The state's next witness, Cynthia Felix, claimed she was a member of the Bratz in the summer of 1993. Felix remembered McCoy talking, sometime that summer, about not hurting people when jumping them into and out of the gang. McCoy also mentioned electing officers and having members chip into a kitty. Felix remembered that none of the gang

members followed any of McCoy's ideas.

The next witness, Lisa Acosta, admitted she was a member of the Bratz from sometime in early-1993 to, at least, the time of trial. Ms. Acosta recalled meeting Jerry McCoy at a barbeque, but did not remember McCoy ever saying anything about how gangs operate.

Elena Otero, the next witness, admitted taking part in an assault on Charity Cox and pleading delinquent in a juvenile proceeding for her part. She met McCoy once at a social occasion.

Kama Nuñez, testifying next, admitted being a member of the Bratz and having had taken part in the assault on Charity Cox. Ms. Nuñez was present at a barbecue where she met Jerry McCoy. She recalled McCoy saying something about the Bratz forming alliances, or clicking-up, with other gangs. Ms. Nuñez understood the statement to mean the Bratz could have others to back them, if they needed it, or merely getting more friends and socializing with others to prevent violence between groups. Nuñez also testified that she heard McCoy say those who put down the neighborhood should be warned not to do so. Nuñez also was impeached into recalling she saw McCoy at a court-in, or initiation, of someone nicknamed Chappo. She could not recall McCoy doing anything there.

The next witness, Cherity Cox,[2] recalled Chappo's court-in, and testified he received

[2] Cherity Cox was involved in the drive-by shooting death of a young woman on September 24, 1994--a month after her testimony in this case. She was convicted of first-degree murder in this gang-related killing on December 14, 1995. She was sentenced, on

a black eye, bloody lip and a nose bleed. Cox also testified that she was with two other Bratz members "last summer" when one of them shot a gun out the window of the car in which they were driving and at another car.

Cox testified she heard McCoy make statements "about how a gang is organized, how it conducts itself." She attributed to McCoy statements that the Bratz members needed to make the Bratz stronger, that the gang needed officers and more graffiti, that members needed to make people listen to them and do what they say, that they needed to recruit strong members and discard the weak. Cox then testified that McCoy set aside the Nietzschean diatribe and added that the Bratz needed officers and a kitty for barbecue, bail, t-shirts, and drugs.

McCoy impeached Cox with evidence she lied about her tattoos, and lied to the police about the assault. Cox admitted she had falsely accused McCoy before, telling police he had asked her to bury a gun when, in fact, that never happened. Finally Cox admitted to misleading investigators about the case as recently as a few days before trial.

Jessica Ruiz testified to hearing Jerry McCoy talk about electing officers, forming alliances with other gangs, and creating some sort of treasury. On cross-examination, however, Ms. Ruiz admitted McCoy was talking more about the way the gang he had been a member of in California was run. Ruiz added that what McCoy was talking about was

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January 17, 1996, to twenty-five years to life in prison. Cox's defense was coercion; she claimed her confession was a lie and the result of threats from a codefendant.

fighting less, getting together and having barbecues, and having pride in one's self.

Christina Hernandez next testified, and recalled Jerry McCoy complaining that the Bratz were too violent and their interests would be best served by no longer fighting with other groups.

Following a verdict of guilty in the Pima County Superior Court, McCoy exhausted his state remedies. He petitioned the United States District Court for the District of Arizona for habeas corpus relief. The district court, after reviewing the state court record, found the facts of the state court trial showed there was no evidence that McCoy specifically intended anything he said to promote the commission of a felony by the Bratz. It further found there was insufficient evidence to prove the Bratz was a criminal syndicate or that it or its members had committed a felony at McCoy's behest.

The Ninth Circuit Court of Appeals, following *de novo* review of the district court's decision, upheld the district court's granting of the writ of habeas corpus. Holding that the evidence from trial concerning McCoy's speech to the gang members showed that the speech was, at most, "mere abstract advocacy of lawfulness" and was not an intentional effort to promote or further illegal activity, that court found the speech protected by the first amendment to the Constitution of the United States. As the only evidence tending to show that McCoy directed or advised the gang was the protected speech, the Ninth Circuit concluded by affirming the district court's granting of the writ.

REASONS WHY THE PETITION SHOULD BE DENIED

Stewart's petition before this Court presents a case limited to particular facts as a blanket indictment of an Arizona criminal statute. The Ninth Circuit Court of Appeals, following well established precedent from this Court and others, held that in this one case, the evidence before the trial court was speech protected by the first amendment to the Constitution of the United States. The Ninth Circuit properly applied long-accepted principles of first amendment jurisprudence to the facts of the case to hold that McCoy could not be convicted of the crime charged based on what he was heard saying to or about the Bratz.

The Ninth Circuit's Decision in this Case Correctly Applies First Amendment Precedent.

Petitioner Stewart argues in its petition that the Ninth Circuit, applying *Brandenburg v. Ohio*, 395 U.S. 444 (1969), found unconstitutional the Arizona statute in question, A.R.S. § 13-2308(A)(3). The Ninth Circuit, to the contrary, held that McCoy's speech was "[f]ar from demonstrating a specific intent to further illegal goals." It was more "abstract advocacy of lawlessness." *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir.2002). Thus, the opinion, while analyzing the reach of the first amendment, found insufficient evidence to sustain the Arizona conviction. It did not negate the statute itself.

Petitioner challenges the Ninth Circuit's interpretation of the "imminent lawless action" component of *Brandenburg*, arguing that under other decisions McCoy's conduct could be seen as unprotected. To support its argument, he cites a recent Ninth Circuit

opinion defining "threat," as used in 18 U.S.C. § 248. While Jerry McCoy has no disagreement with Stewart's statement of the definition of threat reached by the Ninth Circuit, he does not see how it applies to his case.

Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir.2002), the case cited by Stewart, clearly distinguishes a "threat" from advocating, inciting or producing lawless action. It continues to interpret *Brandenburg* and progeny as protecting speech that advocates violence when that speech is not directed at producing imminent lawlessness.

> *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action. So do *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (overturning disorderly conduct conviction of antiwar protestor who yelled "We'll take the fucking street later (or again)"), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.
>
> However, while advocating violence is protected, threatening a person with violence is not. In *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), the Court explicitly distinguished between political hyperbole, which is protected, and true threats, which are not. Considering how to construe a statute which prohibited "knowingly and willfully ... (making) any threat to take the life of or to inflict bodily harm upon the President," the Court admonished that any statute which criminalizes a form of pure speech "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 705, 707, 89 S.Ct. 1399. In that case, an 18-year old war protester told a discussion group of other young people at a public rally on the Washington Monument grounds: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday

> coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706, 89 S.Ct. 1399. His audience laughed. Taken in context, and given the conditional nature of the statement and the reaction of the listeners, the Court concluded that the speech could not be interpreted other than as "a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708, 89 S.Ct. 1399. Accordingly, it ordered judgment entered for Watts. 290 F.3d 1058 at 1071-1072.

Nowhere in *Planned Parenthood* does the Ninth Circuit change its definition of imminent as it applies to first amendment protections. It simply distinguishes "threat," as defined in the particular federal statute, as being a different creature than the violence or lawlessness discussed in *Brandenburg*.

Petitioner Stewart urges this Court to expand the Eighth Circuit's decision in *United States v. Buttorff*, 572 F.2d 619 (8th Cir.1978), to apply to the matter now before the Court. *Buttorff* upheld the convictions of tax protestors, on aiding and abetting charges, for telling groups of disgruntled citizens how to avoid paying income tax. The Eighth Circuit made no new definition of "imminent," as Stewart alleges. Rather, they found that the "how-to" advice given by Buttorff and others actually caused several persons to file fraudulent tax returns. And, in other instances, Buttorff and his cohorts actually helped fill out forms and were paid for their advice.

The Ninth Circuit recognized the insight advanced in *Buttorff*. In a footnote in the *McCoy* opinion, the court reasoned that McCoy's argument "would, or course, be undermined if the state could prove that the speech actually caused imminent lawless action." Contrary to Stewart's arguments, the Ninth Circuit laid down no time requirement for

"imminent." It correctly stated the matter would be different if McCoy actually caused someone to commit a crime, without setting a time limit.

> McCoy's argument that his speech was mere abstract advocacy would, of course, be undermined if the state could prove that the speech actually caused imminent lawless action. Here, however, McCoy correctly observes that his words did not actually incite anyone to commit a crime. There is no evidence in the record that the Bratz engaged in any crime as a result of his advice. Indeed, there is no evidence that McCoy's speech played any part at all in any crime committed by the Bratz. Cynthia Felix, a Bratz member, testified that she didn't think the Bratz implemented McCoy's idea about how to court-out girls. No one testified that the Bratz took McCoy's advice about tagging up the neighborhood. And while the evidence demonstrated that members of the Bratz were involved in crimes, nothing indicates that their criminal activity was in any way inspired by or "proximate" to McCoy's speech. *McCoy, supra*, 282 F.3d at 632, n.6.

Stewart fails to distinguish those cases where crime involves speech, such as *United States v. Barnett*, 667 F.2d 835 (9th Cir.1982), and cases such as this where the state tries to criminalize speech. The Ninth Circuit, in *Barnett*, made mention of the difference.

> The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction. The use of a printed message to a bank teller requesting money coupled with a threat of violence, the placing of a false representation in a written contract, the forging of a check, and the false statement to a government official, are all familiar acts which constitute crimes despite the use of speech as an instrumentality for the commission thereof. *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir.1982).

While Stewart tries to use *Barnett* to support his argument that McCoy's speech was criminal, that case does nothing to further his cause. It merely held that a recipe for an illegal drug is not protected from seizure by reason if its being a printed document. In dicta, the

court added that the written or printed nature of an illegal act does not protect it from prosecution.

> We are not here concerned with the defense Barnett may interpose at his trial; our concern is, rather, the existence of probable cause to support a search. To the extent, however, that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct. *Barnett*, 667 F.2d at 843.

Petitioner Stewart fails to wrest McCoy's case into the arena of those cases where a court of appeals found words to be criminal. His citations and argument simply reinforce the Ninth Circuit's correct decision that Jerry McCoy did not cause any one to commit a crime nor try to incite any one to criminal conduct.

Stewart's Play to Patriotism Fails.

As a last ditch effort to persuade this Court to grant certiorari to his cause, petitioner Stewart suggests this country will not be safe from terrorism if the Court allows *McCoy v. Stewart* to stand. Stewart's argument is misplaced.

Should terrorism succeed in eroding the freedom enjoyed in this country, it wins. Should freedom of speech be abridged because of terrorist acts, we bow to its threat. The message this country must send to those who hate it and attack it is that we will not be bent to their demands. We will not give up that which makes us the envy of the world because misguided zealots have succeeded in destroying buildings and taking lives.

Stewart's disingenuous play on our patriotic sympathies belittles his cause and smacks

of desperation. He seemingly suggests a new McCarthyism, where we can no longer be free to say what we think. And, he suggests the first victim of tightened restrictions on speech should be Jerry McCoy.

CONCLUSION

Terry Stewart argues the Ninth Circuit ruled A.R.S. § 13-2308(A)(3) unconstitutional. This is not true; the court merely held that what McCoy said did not violate the statute. Stewart argues that the Ninth Circuit somehow misinterpreted *Brandenburg* and misdefined "imminent" in arriving at its affirmation of the district court. His arguments are misplaced and unpersuasive. Finally, he believes the war on terrorism should receive a new weapon–greater restrictions on speech. His proposed weapon would only aid terrorism in its attempt to cow the American spirit.

The Ninth Circuit correctly decided *McCoy v. Stewart*. There is no reason to grant certiorari in this matter.

Respectfully submitted this 2nd day of August, 2002.

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